

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicant	:	Errico, James H.	Group Art Unit	:	2424
Serial No.	:	09/819,126	Examiner	:	Shepard, Justin E..
Filed	:	March 27, 2001	Attorney Docket	:	7146.0107
Customer No.	:	55648			
Title	:	AUDIOVISUAL INFORMATION MANAGEMENT SYSTEM			

**APPELLANT'S REPLY BRIEF**

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July 22, 2009

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Commissioner for Patents  
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Dear Sir:

**BACKGROUND**

This brief is in furtherance of the Notice of Appeal filed in this case on November 21, 2008 and the Appeal Brief filed on January 26, 2009, and responds to the Examiner's Answer mailed on May 22, 2009.

## **STATUS OF CLAIMS**

### **A. TOTAL NUMBER OF CLAIMS IN THE APPLICATION**

There are 29 claims currently pending in the application.

### **B. STATUS OF ALL CLAIMS**

Claims canceled: 12, 16-24, 29-49, 54-56, 58, 65-69.

Claims withdrawn: None.

Claims pending: 1-11, 13-15, 25-28, 50-53, 57, 59-64.

Claims allowed: None.

Claims objected to: 1, 10, 25, 50, 57, and 60.

Claims rejected: 1-11, 13-15, 25-28, 50-53, 57, 59-64.

### **C. CLAIMS ON APPEAL**

Claims 1-11, 13-15, 25-28, 50-53, 57, 59-64 are on appeal.

A copy of the claims on appeal is set forth in the Claims Appendix to this Brief.

**GROUND FOR REJECTION TO BE REVIEWED UPON APPEAL**

The grounds of rejection presented for review are: (1) whether claims 1-11, 13, 14, 25-27, 50-53, 57, and 60 are unpatentable under 35 U.S.C. § 103(a) as being unpatentable over Herz, U.S. Patent No. 6,020,883 in view of Finseth, U.S. Patent No. 6,754,906; and (2) whether claims 15, 28, 59, and 61-64 are unpatentable under 35 U.S.C. §103(a) over the combination of Herz and Finseth and in further view of Graves, U.S. Patent No. 5,410,334.

## **ARGUMENT**

### **I Group I (claims 1-11, 13, 14, 25-27, 50-53, 57, and 60)**

#### **A. Objection to claims 1, 10, 25, 50, 57, and 60.**

The Examiner has withdrawn the objection to these claims based on the explanation provided in the applicant's Appeal Brief. *See* Examiner's Answer at p. 17.

#### **B. Rejection of claims 1-11, 13, 14, 25-27, 50-53, 57, and 60 under 35 U.S.C. § 103(a) as being unpatentable over the combination of Herz and Fiueth.**

##### **1. Claims 1-9**

Independent claim 1 includes the limitation of user "preferences" that are both arranged hierarchically by content *and* include data selectively indicative of either positive, negative, or neutral desirability for the preference. These user preferences are compared to content attributes of available programming, arranged in a similar hierarchy, so as to select desirable programming for the viewer. The applicant argued that these user "preferences" are not disclosed by the cited Herz reference, as asserted by the Examiner, because at best Herz discloses profiles (moods) that are arranged hierarchically by the time window within which they are applied, and not according to the claimed hierarchy. Moreover, the profiles (moods) of Herz cannot be considered the claimed "preferences" because these profiles are not assigned negative, or even neutral values.

As a threshold matter, the Examiner seems to dispute the one-to-one equivalency between a "mood" as described by Herz and a customer "profile" which itself contains content preferences. *See* Examiner's Answer at p. 22 lines 6-15. The issue can be summarized as whether a "mood" as disclosed by Herz is merely *an abstraction of* a customer profile itself distinguished solely by the content preferences contained therein (the applicant's argument), as opposed to being implemented literally in the method of Herz as some collective preference that can be matched to the attributes of incoming programming (the Examiner's argument).<sup>1</sup> The disclosure

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<sup>1</sup> At one point, the Examiner hypothesizes that a parent could assign a negative "value" to a son's "violent mood between 4-5 pm on Fridays so violent programs could not be suggested to their child." This hypothetical has no relationship to any methods or calculations actually disclosed in Herz. In the system of Herz, a parent prevents children from watching violent content by assigning negative cv values to the preferences within their child's profiles, i.e. by assigning their children profiles that, in fact, do not match their children's moods. Stated differently,

of Herz supports the former interpretation. *See* Herz at col. 17 lines 41-43 (“Customer profiles used in accordance with the preferred embodiment of video scheduling preferably incorporates this *concept* of moods.”)(emphasis added). The Examiner’s argument is itself seemingly contradictory. The Examiner acknowledges the disclosure of Herz that “each ballot may correspond to a mood”, and interprets this to mean that should the user “like to *define* more than one mood, the user would *need to* fill out more than one ballot.” *See* Examiner’s Answer at p. 22 (emphasis added). Then, however, the Examiner states that “if *more than one mood is indicated in a ballot*, the moods cannot be viewed as a profile as they contain more than the generic mood.” *Id.* (emphasis added). The flaw in this reasoning is a single ballot cannot be used to define more than one mood vis-à-vis each other, as initially conceded by the Examiner.

The balloting process described by Herz is simply a method to establish one or more customer profiles, where the profiles individually can be *conceptually* thought to correspond to some undefined “mood” of the customer. The Examiner misreads those passages of Herz describing illustrative customer moods, disclosed therein only as an abstract construct for justifying the mathematical processes Herz applies to numerical data (e.g., “satisfaction factors” and “punishment factors”, Herz at col. 18 line 6 to col. 19 line 3) as instead being some literal input that is itself assigned values, arranged in a hierarchy, etc. *See* Examiner’s Answer at pp. 23-24. This interpretation of Herz is untenable. The term “preferences” cannot plausibly be read on the disclosure of “moods” of Herz because a person’s “mood” does not correspond to *measurable attributes* of incoming programming as stated in the applicant’s claims; rather, it is the preference ratings for content attributes (i.e.  $cv_{jk}$  at col. 10 line 31 of Herz) that is matched to a value measuring the amount of that attribute in a prospective program (i.e.  $cp_{jk}$  at col. 10 line 37 of Herz.).

The dispositive issue as to whether the profiles of Herz can be considered the applicant’s claimed “preferences” as stated in independent claim 1 is whether those profiles have the characteristic of being assigned positive, negative, or neutral values. The Examiner notes that Herz discloses that a profile may be assigned a satisfaction factor  $sf$ , but ignores the express disclosure in Herz that this value must be greater than or equal to 1, and specifically the inverse

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a parent will assign their children profiles that would be conceptually characterized as “peaceful”, regardless of what actual mood the child happened to have at the moment. Herz does not disclose a panoply of pre-packaged “moods” to which a customer can assign ratings independently of the  $cv$  values of the preferences within a profile.

of the time window of a profile divided by the amount of time in a day, up to a maximum value.<sup>2</sup> See Herz at col. 18 lines 6-14. Instead, the Examiner inexplicably argues that Herz “does not state what types of values could be assigned [to the satisfaction factor]” and therefore concludes that “one of ordinary skill in the art could interpret that the *cv* and *sf* variables are equivalent and therefore obey the same rules.” See Examiner’s Answer at p. 19. This is nonsensical. Not only *does* Herz “state what types of values could be assigned” to the satisfaction factor, as described above, but the satisfaction factor *sf* and the preference ratings *cv* are not remotely equivalent. Since the preference ratings *cv* correspond to a customer’s liking or disliking of a particular program attribute, e.g. action, violence, romance, etc., it conceptually makes sense that a customer rating *cv* for a given attribute could be assigned a negative value, as Herz expressly discloses (although parenthetically, also discourages). See Herz at col. 10 line 51 to col. 11 line 12. However, a negative, or even neutral value for a *profile*, or a mood as read by the Examiner, has no meaning in the system of Herz, particularly since the satisfaction factor *sf* attached to a profile simply measures the amount of time within a day encompassed by a profile, a *scalar quantity*. Alleging that the satisfaction factor of Herz could be negative makes no more sense than alleging that the mass term “*m*” in the equation  $F=ma$  could be negative, or the intensity value of a red pixel in an image could be negative. Nor does it make sense to argue that a user might want to express dissatisfaction with a profile or mood, as a user would not create such a profile in the first instance.

Moreover, as noted in the applicant’s appeal brief, though the preferences within the profiles disclosed by Herz may be assigned positive, negative, or neutral values in some disclosed embodiments, these preferences are not arranged in the type of hierarchy claimed. The Examiner has conceded this point, basing the rejection solely on the premise that the claim term “preferences” reads on the “moods” of Herz. See Examiner’s Answer at p. 21 (“The Examiner agrees that the other preferences taught by Herz are not arranged [in the claimed hierarchy. . .]. The focus has been the moods.”)

Thus, for each of these reasons, the Herz fails to disclose the claimed “preferences” of independent claim 1, hence claims 1-9 patentably distinguish over the cited prior art.

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<sup>2</sup> As indicated above, Herz also discloses a separate “punishment factor” that is inherently negative and cannot be positive. Moreover, this punishment factor is not a characteristic of a profile or mood, but represents a characteristic of a program, namely the amount of time by which a given program is outside the window of a profile.

## 2. Claims 10, 11, 13, 14, 25-27, 50-53, 57, and 60

All independent claims recite the limitations of “*receiving . . . preferences arranged in hierarchical levels including at least a first level and a second level where said second level . . . includes preferences descriptive of one or more preferences of said first level at a finer level of detail, wherein said first level includes preferences that together encompass all preferences of said second level*”, and where the preferences “correspond to” received attributes of incoming programming content. (emphasis added) This hierarchy is not disclosed by the cited prior art.

As noted in the applicant’s appeal brief, the reference relied upon by the Examiner as disclosing this limitation does not do so. Herz discloses that a person may compile multiple profiles, where each profile includes a set of individual preference values, and a time window in which each profile is valid. Herz discloses that if desired, the profiles may be nested by time, i.e. one profile may be assigned a time window completely enveloped by that of another profile, etc. As argued by the Examiner, and as conceded by the applicant, this nesting structure is a hierarchy. Notably, however, it is not the type of hierarchy claimed. First, because the nesting structure is by time only, no information in a second level of the prior art hierarchy would be “*descriptive of one or more preferences of said first level at a finer level of detail.*” This is true even with respect to the individual preference values within the profile. As stated in the applicant’s appeal brief, because Herz discloses that profiles contain preferences, and the profiles are arranged in a time-window hierarchy, the preferences are also arranged in that hierarchy. But the preferences of a second level profile do not “describe” any of the preferences of the profile of the encompassing time window “at a finer level of detail”, nor can it be said that the set of preferences in the second level profile describes the set of preferences of the first at a finer level of detail. Herz only discloses that the sets of preferences in the respective profiles can be different.<sup>3</sup>

The Examiner concedes this, but instead points to the description in Herz of “moods” that can be represented by the profiles. *See Examiner’s Answer at p. 21.* The Examiner does this because, in the illustration given by Herz, moods of “peaceful” and “speculative” are stated, and

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<sup>3</sup> In the same vein, any reading of the claim term “preferences” on the actual user preferences of Herz, within each profile, would be futile because no aspect of Herz discloses that the preferences within a first level profile encompass all the preferences within a second level profile nested within the first profile, as is claimed.

the Examiner asserts that “speculative” describes “peaceful” at a finer level of detail. As noted in the previous section, however, the discussion of “moods” in Herz is merely background for explaining the utility of the procedures disclosed therein. Any subjective correlation between a profile and a “mood” that it might happen represent is not recorded or otherwise preserved in the system of Herz, hence it cannot be argued that information associated with one profile is “descriptive of” information associated with a second profile, even in the circumstance that, in a user’s mind, the profiles have some subjective relationship.

Second, all independent claims recite the limitation of “receiving a first plurality of program information corresponding to said at least one of said audio and video, where said plurality of said first program information includes attributes *each* corresponding to *a respective one* of said user preferences” where the attributes are arranged in the same hierarchy as claimed with respect to the user preferences. Because the Examiner reads the applicant’s preferences on the profiles/moods of Herz, the Examiner then must show that the received program attributes each correspond to a respective one of those profiles/moods. The Examiner cites the secondary reference, Finseth, as disclosing this limitation, but that reference only discloses that a programming guide can display available programs according to a hierarchy of *subject matter*, e.g. “news”, “drama”, etc. Because the programming content of Finseth is nested by content instead of time, as shown in FIG. 4 of that reference, each of the content attributes of drama, news, etc do not correspond to a particular profile. Nor can it be said that a given program’s time attribute corresponds to a respective *one* of the nested preference profiles because the time attribute of the incoming program would correspond to all profiles nested together that encompass that time slot.

Thus, for each of these reasons, all of claims 1-11, 13, 14, 25-27, 50-53, 57, and 60 patentably distinguish over the cited prior art.

## **II GROUP II** (claims 15, 28, 59, and 61-64)

Each of these dependent claims depends from a respective one of independent claims 1, 10, 25, 50, 57, and 60, and are therefore patentably distinguished over the cited prior art for the same reasons as the independent claim from which each respectively depends. The applicant thus requests that the respective rejections of the claims of Group II be withdrawn.



### **III. Conclusion**

In view of the foregoing amendments and remarks, the applicant respectfully requests that the Examiner's rejection of claims 1-11, 13-15, 25-28, 50-53, 57 and 59-64 be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kurt Rohlfs', is written over a horizontal line.

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